Supreme Court, U.S.
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No. 95-546

In The

Supreme Court of the United States

October Term, 1995

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
a special purpose Wisconsin municipal corporation,

Petitioner,

v.

S.A. HEALY COMPANY,
an Ohio corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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QUESTION PRESENTED FOR REVIEW

In a diversity action the plaintiff made a pretrial settlement demand based upon a state procedural rule analogous to FED. R. CIV. P. 68, invoking the state rule over Rule 68 since defendants but not plaintiffs are authorized to make pretrial settlement offers under Rule 68. The question presented is whether Rule 68 is sufficiently broad to control pretrial settlement offers in diversity actions and preempt the analogous Wisconsin rule under the Rules Enabling Act.

LIST OF PARTIES

The petitioner, Milwaukee Metropolitan Sewerage District, is a special purpose Wisconsin municipal corporation. *See* WIS. STAT. §§ 66.88 to 66.918 (1993-94) (statutory framework for Milwaukee Metropolitan Sewerage District).

The respondent, S.A. Healy Company, is an Ohio corporation with its principal place of business at McCook, Illinois. The respondent is a wholly-owned subsidiary of Impregilo International USA, Inc. Publicly-held companies owning 10% or more of the stock in Impregilo International USA, Inc. include:

(1) Impregilo International BV Holland;

(2) Impregilo SPA, Italy;

(3) Cogefarimpresit;

(4) Lodigiani SPA; and

(5) Girola SPA.

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Rule 68 is sufficiently broad to control pre-trial settlement offers and a Wisconsin rule that allows plaintiffs to make settlement offers is preempted under the Rules Enabling Act.

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The petitioner, Milwaukee Metropolitan Sewerage District, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit that was entered on July 13, 1995.

PUBLICATION OF OPINIONS

Four opinions have been published. The opinion that gives rise to this petition for a writ of certiorari is *S.A. Healy Company v. Milwaukee Metropolitan Sewerage District*, 60 F.3d 305 (7th Cir. 1995) (app. 1a-15a), *rev'g*, 159 F.R.D. 508 (E.D. Wis. 1994) (app. 16a-25a). Other opinions arising from this litigation include *S.A. Healy Company v. Milwaukee Metropolitan Sewerage District*, 50 F.3d 476 (7th Cir. 1995) (seeking new trial based upon trial error) and *S.A. Healy Company v. Milwaukee Metropolitan Sewerage District*, 154 F.R.D. 212 (E.D. Wis. 1994) (payment for time spent by expert witness preparing for deposition under 1993 amendments to Rule 26).

JURISDICTIONAL STATEMENT

This case is on direct review from a final order entered by a federal district court. The United States Court of Appeals for the Seventh Circuit entered its judgment on July 13, 1995. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

Rule 68 of the Federal Rules of Civil Procedure provides:

> **Rule 68. Offer of Judgment**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which will have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 807.01 of the Wisconsin Statutes (1993-1994) provides:

> **807.01. Settlement offers**
>
> (1) After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.
>
> (2) After issue is joined but at least 20 days before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed

the damages offered, neither party shall recover costs.

(3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

(4) If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04(4) and 815.05(8).

(5) Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

The Rules Enabling Act, 28 U.S.C. § 2072 (1988) provides:

> **§ 2072. Rules of procedure and evidence; power to prescribe**
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 1961 provides:

> **§ 1961. Interest**
>
> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States

Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1986.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

Fed. R. App. P. 38 provides:

Rule 38. Damages and Costs for Frivolous Appeals

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just

damages and single or double costs to the appellee.

I. STATEMENT OF CASE

A. Statement of Facts

The decision of the United States Court of Appeals for the Seventh Circuit sets forth all facts necessary to the question presented:

> This is a sequel to *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, 50 F.3d 476 (7th Cir. 1995), where we affirmed a judgment of $1,574,021 for Healy in its diversity suit for breach of contract. During the litigation, Healy had made a settlement demand upon the sewage district of $1,125,000, which the district had rejected. Thirty-four days after the entry of judgment, Healy had moved the district court to award it double its taxable costs plus interest on the judgment at the rate of 12 percent from the date of the demand to the date on which the judgment is paid. At the time the motion was made, the sum of the costs and interest demanded was almost $200,000. The legal basis for the demand was Wis. Stat. §§ 807.01(3), (4). These sections provide that if a plaintiff's settlement offer is rejected and the plaintiff goes on to win a judgment larger than the offer, he is entitled to twice his taxable costs plus interest at the rate of 12 percent from the date of the demand to the date when the judgment is paid. The district court denied Healy's motion on the ground that Rule 68 of the Federal Rules of Procedure occupies the field of settlement offers

> in federal litigation and precludes the application of state rules dealing with the subject even when, because the basis of federal jurisdiction is diversity of citizenship, the substantive rules of decision are state rather than federal. Rule 68 provides that if a defendant makes a settlement offer which is rejected and the plaintiff wins a smaller amount at trial, the plaintiff shall be liable for the costs that were incurred after the making of the offer. The Wisconsin Statute contains a nearly identical provision. Wis. Stat. § 807.01(1). But unlike the Wisconsin statute, Rule 68 makes no provision for settlement *demands* (that is, plaintiffs' offers as distinct from defendants').

App. 1a-2a.

B. Basis for Federal Jurisdiction

The subject-matter jurisdiction of the federal district court was based upon 28 U.S.C. § 1332 (1988). The subject-matter jurisdiction of the court of appeals was founded upon 28 U.S.C. § 1291 (1988).

II. REASONS FOR GRANTING THE WRIT

A. Important Question of Federal Law

Writing for the court of appeals, Chief Judge Richard Posner singled-out FED. R. CIV. P. 68 as "[t]he only candidate for a specifically endangered rule" amongst the Federal Rules of Civil Procedure. App. 12a. The clash

between Rule 68 and the Wisconsin procedural rule[1] presents an important question of federal law going to the integrity of the Federal Rules of Civil Procedure that should be settled by the Court, an appropriate exercise of certiorari review because the court of appeals' decision conflicts with decisions of the Court. S. Ct. R. 10(c).

The court of appeals concluded "[t]here is no direct conflict between the Wisconsin rule concerning plaintiffs' settlement demands and any rule of federal procedure; the part of the state's offer-of-settlement statute involved in this case governs offers by plaintiffs, while Rule 68 is limited to offers by defendants." App. 10a. This conclusion focused upon details of Rule 68 and the Wisconsin rule. The focus upon details – rather than looking to whether the federal and state rule were sufficiently coextensive in their purposes – departs from this Court's decisions in *Burlington Northern Railroad Company v. Woods*, 480 U.S. 1 (1987), and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

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[1] Statutes in sixteen states allow both plaintiffs and defendants to make pretrial settlement offers to which penalties may attach, similar to WIS. STAT. § 807.01. *See* ALASKA STAT. § 09.30.065 (1994); CAL. CIV. PROC. CODE § 998 (West 1995); COLO. REV. STAT. § 13-17-202 (1994); CONN. GEN. STAT. §§ 52-192a, -193, -194 (1994); FLA. STAT. ANN. § 45.061 (1995); IDAHO CODE § 12-301 (1995); IND. CODE § 32-11-1-8.1 (1994); MICH. COMP. LAWS ANN. § 600.6013 (West 1995-96); MINN. R. CIV. P. 68; NEV. REV. STAT. § 17.115 (1993); N.D. R. CIV. P. 68; OHIO R. CIV. P. 68; OR. R. CIV. P. 67(F); TENN. R. CIV. P. 68; WASH. REV. CODE ANN. § 4.84.280 (West 1995); WIS. STAT. § 807.01 (1993-94).

A direct collision between federal and state law, so that the Rules Enabling Act requires application of the federal rule in diversity cases,

> is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the 'direct collision' language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute.

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. at 26 n.4. *See Burlington Northern Railroad Company v. Woods*, 480 U.S. at 7 (state rule preempted if state and federal rules are sufficiently coextensive). The lower court failed to heed this.

Rule 68 and the Wisconsin rule are sufficiently coextensive in purpose so that under the Rules Enabling Act the federal prohibition against a plaintiff making a settlement offer preempts contrary state practice. Both Rule 68 and the Wisconsin rule (1) encourage pretrial settlement offers in civil cases, (2) establish procedures for making offers of judgment, (3) attach penalties if the offer is refused and the offering party does better at trial, and (4) convert accepted offers into enforceable judgments. Distinguishing details between the federal and state rules are irrelevant, gutting the distinction the Seventh Circuit drew between settlement *demands* from plaintiffs and settlement *offers* from defendants. The Seventh Circuit's focus upon details on this important federal question conflicts with decisions of the Court and displaces Rule 68 in sixteen states where statutes allow plaintiffs to

make pretrial settlement demands, destroying uniformity in federal practice under the Rules Enabling Act.

B. Error Below

Except in the Seventh Circuit where a diversity plaintiff triggers Wisconsin's pro-plaintiff rule, the Federal Rules of Civil Procedure protect a defendant from settlement pressure. Thus, the Wisconsin rule conflicts with notice pleading and policy choices made by the drafters of the federal rules in favor of allowing pretrial settlement offers only from defendants.

> The Wisconsin rule favors plaintiffs by giving them the option of putting the defendant to the unhappy choice of either settling on terms favorable to the plaintiff or running a substantial risk of increasing the amount of money to which the plaintiff will be entitled if the case is not settled but instead is tried and the plaintiff wins.

App. 11a. Under the Wisconsin rule a plaintiff may make a settlement offer "[a]fter issue is joined," Wis. Stat. § 807.01(3), a time that may be a mere twenty days after service of the summons and complaint. A plaintiff's early settlement offer may bank upon the substantial risk imposed by the Wisconsin rule and steeply discount the demand in the complaint for two reasons. First, the plaintiff knows that a refusal by the defendant will trigger "interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid," Wis. Stat. § 807.01(4), an amount that rapidly adds up given the delay in getting a civil case to trial. Second, the plaintiff will save litigation costs if the

defendant accepts a settlement offer based upon nothing more than the complaint, a notice pleading that may require a small commitment of resources. As drafted, Rule 68 protects a defendant from settlement pressure because a plaintiff cannot trigger the penalties of Rule 68, a concern that caused rejection in 1983 and 1984 of proposals from the advisory committee to allow plaintiffs to make settlement demands under Rule 68. 7 MOORE'S FEDERAL PRACTICE ¶ 68.07 [1]-[5] (2d ed. 1995). *Cf.* FED. R. CIV. P. 56(f) (protecting a defendant against unfair pressure when summary judgment is sought before discovery is completed by allowing the court to refuse to consider summary judgment). The Seventh Circuit upsets this balance in Wisconsin and fifteen states.

In addition, the nearly $200,000 penalty sought under the Wisconsin rule has risen, according to the respondent's demand, to $278,000 during the pendency of the appeal before the Seventh Circuit. By requiring 12% interest on the amount recovered even after entry of judgment, the Wisconsin rule clashes with the federal statute on postjudgment interest. Federal law requires that interest on any money judgment in a civil case "shall be calculated from the date of the entry of the judgment" and that the amount of interest is not necessarily 12% but varies "at a rate equal to the coupon issued yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." 28 U.S.C. § 1961(a) (1988 & Supp. V 1993).

Finally, the Wisconsin rule imposes a mandatory penalty during the appeal. Mandatory penalties are inconsistent with the discretionary scheme of FED. R. APP. P. 38. *Burlington Northern Railroad Co. v. Woods* (state's mandatory affirmance penalty preempted in diversity case by FED. R. APP. P. 38).

III. CONCLUSION

The Court should grant the writ of certiorari, order briefing on the question presented, and set the case for argument. In the alternative, the judgment of the United States Court of Appeals should be summarily reversed and the case remanded to the Seventh Circuit with directions to affirm the district court order.

Respectfully submitted,

MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT

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In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 95-1072

S.A. HEALY COMPANY,

Plaintiff-Appellant,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 91 C 1260 – Myron L. Gordon, *Judge.*

ARGUED MAY 31, 1995 – DECIDED JULY 13, 1995

Before POSNER, *Chief Judge,* RIPPLE, *Circuit Judge,* and NORGLE, *District Judge.**

POSNER *Chief Judge. This is a sequel to S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District,* 50 F.3d 476 (7th Cir. 1995), where we affirmed a judgment of $1,574,021 for Healy in its diversity suit for breach of contract. During the litigation, Healy had made a settlement demand upon the sewage district of $1,125,000, which the district had rejected. Thirty-four days after the entry of judgment, Healy had moved the district court to award it

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* Hon. Charles R. Norgle, Sr., of the Northern District of Ilinois.

double its taxable costs plus interest on the judgment at the rate of 12 percent from the date of the demand to the date on which the judgment is paid. At the time the motion was made, the sum of the costs and interest demanded was almost $200,000. The legal basis for the demand was Wis. Stat. §§ 807.01(3), (4). These sections provide that if a plaintiff's settlement offer is rejected and the plaintiff goes on to win a judgment larger than the offer, he is entitled to twice his taxable costs plus interest at the rate of 12 percent from the date of the demand to the date when the judgment is paid. The district court denied Healy's motion on the ground that Rule 68 of the Federal Rules of Procedure occupies the field of settlement offers in federal litigation and precludes the application of state rules dealing with the subject even when, because the basis of federal jurisdiction is diversity of citizenship, the substantive rules of decision are state rather than federal. Rule 68 provides that if a defendant makes a settlement offer which is rejected and the plaintiff wins a smaller amount at trial, the plaintiff shall be liable for the costs that were incurred after the making of the offer. The Wisconsin statute contains a nearly identical provision. Wis. Stat. § 807.01(1). But unlike the Wisconsin statute, Rule 68 makes no provision for settlement demands (that is, plaintiffs' offers as distinct from defendants').

The sewage district argues that Healy's motion, filed as we have said 34 days after the entry of judgment, was untimely, and therefore was rightly denied irrespective of its merits. A local rule of the U.S. District Court for the Eastern District of Wisconsin requires that the bill of costs be filed within 15 days of the judgment, E.D. Wis. R. 9.01;

and a request for prejudgment interest must, the sewage district argues, be filed within 10 days of the judgment because it is a request to alter or amend the judgment and is therefore governed by Fed. R. Civ. P. 59(e), which has a 10-day deadline.

Because Fed. R. Civ. P. 54(d) specifies no deadline for filing a bill of costs, the time for filing such a bill is normally governed by local rules such as that of the Eastern District of Wisconsin. See, e.g., *Mattei v. Cessna Aircraft Co.*, 35 F.3d 1142, 1147 (7th Cir. 1994); *Congregation of the Passion v. Touche, Ross & Co.*, 854 F.2d 219, 220-21 (7th Cir. 1988); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 827 (7th Cir. 1984). And prejudgment interest, unlike postjudgment interest, normally is considered an element of the judgment itself, that is, of the relief on the merits, and hence governed by Rule 59(e). *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176 (1989). But the Wisconsin rule on the consequences of turning down a plaintiff's settlement demand is not a rule about the taxing of costs, or the awarding of prejudgment interest, in the usual senses of "costs" and of "prejudgment interest." The rule imposes a sanction on defendants for turning down reasonable settlement demands. "Costs" and "prejudgment interest" (actually partly prejudgment and partly postjudgment, for the interest is computed from the date of the demand to the date of the payment of the judgment, but we shall ignore this refinement) are merely the measuring rods for determining the amount of the sanction. Wisconsin could have said to defendants that if they reject a modest settlement demand – modest because the plaintiff won a larger judgment at trial – they must pay the plaintiff $200,000 above his judgment. Then it would

be plain that this additional relief was entirely separate from the judgment – that it was like an award of attorney's fees to a defendant as a sanction for filing a frivolous suit. The logic of the measuring rods actually used is transparent. Since as a prevailing party the plaintiff would be entitled to an award of costs anyway, doubling them provides a sanction equivalent to that imposed on a plaintiff who turns down a settlement offer by the defendant and then does worse at trial. But there is an additional asymmetry between plaintiffs and defendants: delay in accepting the plaintiff's demand allows the defendant to earn interest on money that (it is subsequently determined) should really be the plaintiff's. The award of interest from the date of the settlement demand deprives the defendant of this incentive to reject rightful demands.

Healy sought "regular" Rule 54(d) costs, the kind awarded to the prevailing party more or less as a matter of course – and was turned down for missing the 15-day deadline – before it asked for double costs and prejudgment interest under the Wisconsin rule. And it made a timely motion for "regular" prejudgment interest, which the district judge denied on the ground that the contract claim was not sufficiently definite to support such an award under the Wisconsin law of contracts. The issues underlying the motion for prejudgment interest that Healy filed under the Wisconsin rule had nothing to do with Healy's contractual rights and hence with the judgment it obtained in the suit, just as the double costs it sought were unrelated to the costs taxable under Rule 54(d) because imposed for a completely different reason, as a sanction for turning down a settlement demand.

The proper analogy is to the award of attorney's fees, a proceeding deemed collateral to (which is to say separate from) the case on the merits because the amount of fees cannot be determined until the trial is over and because there is limited overlap between the issues in the trial and the issues bearing on the amount of and entitlement to fees. Being collateral, a motion for attorney's fees is not subject to the 10-day limit of Fed. R. Civ. P. 59(e). *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). So what limit *is* such a motion subject to? When the attorney's fees are taxed as costs, which is the usual way in which a prevailing party obtains such fees, see, e.g., 42 U.S.C. § 1988, the deadline for seeking them is 14 days, Fed. R. Civ. P. 54(d)(2)(B), unless this time is extended by an order (including, we have held, a standing order, or rule, *Johnson v. Lafayette Fire Fighters Ass'n*, 51 F.3d 726 (7th Cir. 1995)) of the district court. There was no order here as such, and the parties have not told us whether the Eastern District of Wisconsin has a rule extending (or contracting) the 14-day limit – but in fact it does, to 90 days. E.D. Wis. R. 9.04. This does not get Healy home free, for while the motion here is analogous to a motion for attorney's fees, it was not in fact such a motion, so neither Fed. R. Civ. P. 54(d)(2)(B) nor E.D. Wis. R. 9.04 applies. No matter. Whatever the time limits are for such a motion – and maybe there are none, other than the implied default rule of reasonableness, *Max M. v. New Trier High School District No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) – they are not jurisdictional. The deadline in Rule 54(d)(1) for objecting to the calculation of costs is not jurisdictional, we held in *Lorenz v. Valley Forge Ins.*

Co., 23 F.3d 1259 (7th Cir. 1994), and the analogy to the motion filed here is compelling.

The clincher is *Lentomyynti Oy v. Medivac, Inc.*, 997 F.2d 364, 366-68 (7th Cir. 1993), where we held that a motion for costs under Fed. R. Civ. P. 68, the federal counterpart to the Wisconsin rule under which Healy was proceeding, was not a Rule 59(e) motion. We cannot think of any sound basis for distinguishing between the two types of motion. It is true that Rule 68 contains no provision regarding interest, but we cannot see what difference that should make. We also hinted in *Lentomyynti Oy* that the costs sought in a motion under Rule 68 are not identical to Rule 54(d) costs, 997 F.2d at 368, and we make that explicit today. This means that a local rule prescribing a deadline for Rule 54(d) motions is not *automatically* applicable to a motion for costs under Rule 68 or a motion for double costs under the Wisconsin statute. Apparently Judge Gordon did not consider the local rule applicable, because he did not reject Healy's motion as time-barred, though urged to do so by the sewage district. We add that since the federal rules do not provide deadlines for Rule 68 motions, let alone for motions under counterpart state statutes, district courts are free to fix deadlines for these motions in their local rules.

But all that is important today is that we have jurisdiction and so can proceed, as did the district judge, to the merits.

The applicability of state procedural rules in federal diversity litigation is a knotty issue. A bit of history may help untie the knot. Before the revolution in federalism of 1938, federal district courts in diversity cases conformed

their procedures to those of the state in which the court was located, but (with immaterial exceptions) were not bound by the common law of the state. This pattern was reversed by the promulgation of the Federal Rules of Civil Procedure, which created a separate and distinctive code of procedure for federal courts in all cases, including diversity cases, and by the Supreme Court's decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts were bound by state common law in all cases in which they would be bound by state statutory law. The decision in *Erie* was influenced though not determined by the felt undesirability of forum shopping (sometimes accomplished through such exotic devices as reincorporation in a different state), which had been encouraged by a regime in which the choice of state or federal court might determine what substantive law would govern the litigation. See *id.* at 73-77. Concern with forum shopping argued for an interpretation of "substance" that would encompass any rule, however "procedural" in the ordinary sense, that might determine the outcome of the case. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (Frankfurter, J.). But such an interpretation threatened to emasculate the new Federal Rules of Civil Procedure, some of which might well swing the outcome in particular cases. *Byrd v. Blue Ridge Rural Electric Coop. Inc.*, 356 U.S. 525, 536-37 (1958); *Hanna v. Plumer*, 380 U.S. 460 (1965). A good example was Rule 35, which entitles the defendant in a personal injury suit to conduct a medical examination of the plaintiff if the plaintiff's physical or mental condition is relevant to the issues in the suit. The rule is not limited to personal injury suits, or invokable only by defendants, but that is its usual use

and its usual invocation; and it is thus a rule that by and large favors defendants. One could easily imagine a defendant removing a diversity personal injury suit to federal court for the sole purpose of invoking Rule 35 (for in 1938 many state procedural codes lacked a counterpart to that rule, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941)) and for that invocation to be decisive on the amount of damages awarded the plaintiff. *Cf. Flaminio v. Honda Motor Co.*, 733 F.2d 463, 472 (7th Cir. 1984).

The policy of avoiding potentially outcome-determinative discrepancies between state and federal law in the diversity setting is inconsistent with the policy of subjecting federal litigation, including diversity litigation, to a distinctive set of federal procedures. So it should come as no surprise that there is no clear criterion for deciding whether a particular state rule is "substantive" for purposes of deciding whether *Erie* requires that it be enforced in federal diversity litigation. There are, however, two classes of pretty clear cases, although unfortunately our case falls in neither one. The first consists of cases in which the state rule is in actual conflict with one of the Federal Rules of Civil Procedure, so that enforcing the state rule would knock out the federal rule. If the federal rule is within the scope of the Rules Enabling Act, 28 U.S.C. § 2071(a), under which the Federal Rules were promulgated, then it is valid (barring some constitutional objection not here suggested) and the Supremacy Clause requires that the state rule give way. *Burlington Northern Ry. v. Woods*, 480 U.S. 1, 4-5 (1987); *Hanna v. Plumer, supra; Flaminio v. Honda Motor Co., supra*, 733 F.2d at 471-72.

The second class of pretty easy cases is where the state procedural rule, though undeniably "procedural" in the ordinary sense of the term, is limited to a particular substantive area, such as contract law, *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1438 (7th Cir. 1993); *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 364 (7th Cir. 1990); *AM International, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 576 (7th Cir. 1995), or tort law. *Hines v. Elkhart General Hospital*, 603 F.2d 646 (7th Cir. 1979); *Todd v. Merrell Dow Pharmaceuticals, Inc.*, 942 F.2d 1173, 1177 and n. 1 (7th Cir. 1991); *Jones v. Griffith*, 870 F.2d 1363, 1368 (7th Cir. 1989); *Barron v. Ford Motor Co.*, 965 F.2d 195, 199 (7th Cir. 1992); *Flaminio v. Honda Motor Co., supra*, 733 F.2d at 471. For then the state's intention to influence substantive outcomes is manifest and would be defeated by allowing parties to shift their litigation into federal court unless the state's rule was applied there as well. Suppose a state (as many states have done) establishes a compulsory arbitration mechanism in medical malpractice cases in order to cut down on litigation and reduce malpractice insurance premiums. The state's goals are substantive – designed to shape conduct outside the courtroom and not just improve the accuracy or lower the cost of the judicial process – though the means are procedural. The goals would be thwarted if parties having access to a federal district court under the diversity jurisdiction could thumb their noses at the compulsory procedure. *Hines v. Elkhart General Hospital, supra; Feinstein v. Massachusetts General Hospital*, 643 F.2d 880, 886 (1st Cir. 1981); *Woods v. Holy Cross Hospital*, 591 F.2d 1164, 1168-69 (5th Cir. 1979); *cf. Sioux County v. National Surety Co.*, 276 U.S. 238, 243 (1928); *Monetti, S.P.A. v.*

Anchor Hocking Corp., 931 F.2d 1178, 1181-82 (7th Cir. 1991).

Our case is different. There is no direct conflict between the Wisconsin rule concerning plaintiffs' settlement demands and any rule of federal procedure; the part of the state's offer-of-settlement statute involved in this case governs offers by plaintiffs, while Rule 68 is limited to offers by defendants. Yet at the same time the Wisconsin rule is not confined to any particular area of the law such as insurance contracts or products liability or medical malpractice; the rule does not have substantive goals in any obvious sense. What to do? We must go back to first principles – the course recommended in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980) – and thus ask two questions: Is the Wisconsin rule so likely to dictate outcomes that it will cause a lot of forum shopping (or, if forum shopping is somehow infeasible, cause like cases to be decided differently) unless it is made applicable to diversity cases and so ceases to be a factor in the choice between state and federal court? Is it so entwined with procedures prescribed by the federal rules that it is likely to impair the integrity of federal procedure if it is applied in diversity cases? If the answer to the first question is "yes" and to the second "no," then we can be reasonably confident that application of the Wisconsin rule in diversity cases would be consistent with the principles of *Erie* and the Rules Enabling Act. Those in fact are our answers, just as they were the answers the Supreme Court gave in the *Walker* case to the question whether a state's rule on when a lawsuit commences for purposes of tolling the statute of limitations is binding in a diversity suit, and just as they are the

answers given by the courts that have dealt with rules similar to the Wisconsin rule at issue in the present case. *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1528-29 (11th Cir. 1990); *Fauber v. KEM Transportation & Equipment Co.*, 876 F.2d 327, 331-32 (3d Cir. 1989); *Jarvis v. Johnson*, 668 F.2d 740, 745-46 (3d Cir. 1982). So we need not consider the more difficult question of what to do when the answer to *both* questions is "yes."

The Wisconsin rule favors plaintiffs by giving them the option of putting the defendant to the unhappy choice of either settling on terms favorable to the plaintiff or running a substantial risk of increasing the amount of money to which the plaintiff will be entitled if the case is not settled but instead is tried and the plaintiff wins. If a rule so favorable to plaintiffs is inapplicable in diversity cases, defendants in such cases will have an added incentive to remove a diversity case to federal district court, just as in the days before the *Erie* decision, when a more favorable substantive rule of federal common law might induce a defendant to remove a case from state to federal court or even to reincorporate in a different state in order to create diversity of citizenship. Indeed, the Wisconsin rule is not unlike a rule awarding successful plaintiffs punitive damages on top of compensatory damages; and there is no doubt that such a rule, even if not limited to a particular class of cases – even if reflecting a blanket favoritism for plaintiffs over defendants – would be applicable in diversity suits under *Erie*. *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 606 (7th Cir. 1981); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1416 (4th Cir. 1992) (en banc); cf. *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1497 (10th Cir. 1994). That is an

easier case than ours because damages are considered "remedial" and settlement practice "procedural," as these terms are usually used. But the effects are so similar that classifying both as "substantive" is certainly a possibility when the likelihood of forum shopping is taken into account and when it is recalled that, at least for the purpose of marking out the scope of the *Erie* decision, the terms "substance" and "procedure" are conclusions rather than algorithms. Cf. *Byrd v. Blue Ridge Rural Electric Coop. Inc., supra,* 356 U.S. at 536; *Fragoso v. Lopez,* 991 F.3d 878, 881 (1st Cir. 1993).

Even closer are cases which hold that a rule shifting attorney's fees to a losing party is "substantive" for purposes of determining whether it applies in a diversity suit, *Chambers v. NASCO, Inc.,* 501 U.S. 32, 52-53 (1991); *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259 n. 31 (1975); *Powell v. Old Southern Life Ins. Co.,* 780 F.2d 1265, 1267 (5th Cir. 1986), as distinguished from a rule that, because it punishes winner *or* loser for improper behavior in the lawsuit, does not systematically favor one side of a lawsuit (that is, either the plaintiff or the defendant) over the other and hence is procedural in the least controversial sense. *Chambers v. NASCO, Inc., supra,* 501 U.S. at 51-55.

But would such a classification undermine the Federal Rules of Civil Procedure? The only candidate for a specifically endangered rule is Rule 68. We were unable at the argument of the appeal to extract from the sewage district's lawyer any case real or hypothetical in which enforcing the Wisconsin rule on plaintiffs' demands would tread on the toes of Rule 68. The situation would be different if the case involved defendants' offers of

settlement, because then we would have a state rule and a federal rule covering the identical issue. It is true that the rules are nearly identical so far as defendants' offers are concerned. The only difference appears to be that under the Wisconsin rule the defendant must make his offer at least 20 days before trial and under the federal rule he need only make it 10 days before trial. Still, this is sufficient inconsistency to make the state rule give way, cf. *Burlington Northern Ry. v. Woods, supra; Exxon Corp. v. Burglin,* 42 F.3d 948, 950-52 (5th Cir. 1995), since both cannot be applied to the same case (suppose the motion was made 15 days before the trial) and there cannot be any doubt that Rule 68 is within the scope of the Rules Enabling Act. But there is no inconsistency when a plaintiff's demand rather than a defendant's offer is in issue. Whether or not the plaintiff makes a settlement demand backed up by the threat latent in the Wisconsin rule, the defendant is free to make his own offer under Rule 68. In this case, for example, the defendant must have thought the plaintiff's settlement demand too high, because it refused the demand. Suppose it refused because its best estimate was that the plaintiff's claim was worth only $750,000. Then it could have made a Rule 68 offer of $750,000. If the plaintiff turned it down and the case went to trial and the plaintiff won less than $750,000, the defendant would be entitled to the award of its costs under Rule 68. This would be true whether or not the plaintiff had made any demand.

Rule 68, like Rule 35, favors defendants; in many other respects, however, the Federal Rules of Civil Procedure are very pro-plaintiff, certainly compared with the procedural rules of the average state at the time the rules

were first promulgated, but even today. See, e.g., Richard L. Marcus, "The Revival of Fact Pleading under the Federal Rules of Civil Procedure," 86 *Colum. L. Rev.* 433, 439-46 (1986). So we can imagine an argument that by subjecting defendants in diversity cases to Wisconsin's highly pro-plaintiff settlement rule, we would be disturbing a delicate but deliberate balance between plaintiffs and defendants that is struck in the federal rules, and hence undermining the integrity of those rules. The argument is not made, and is anyway unpersuasive. States are allowed to favor plaintiffs – or defendants – who engage in activities, such as, here, making contracts for constructing sewage systems, that are governed by state law. Under *Erie*, this "favoritism" is to operate even when the persons who have a dispute over state law find themselves in a federal court. The power of the state to jigger procedural rules to favor plaintiffs or defendants in federal diversity suits is limited by the Rules Enabling Act and the Supremacy Clause, but the Wisconsin rule does not transgress those limits. Unless – a final possibility, again not argued by the sewage authority – Rule 68 should be interpreted as if it said outright that no defendant may be penalized for failing to accept a settlement demand. Then we would have a direct conflict, and the Supremacy Clause would be in play.

We cannot find anything in the history or structure of the rule to justify such an interpretation. It is easy to see why the draftsmen of the rule, and the Supreme Court in promulgating it, decided not to make provision for plaintiffs' settlement demands. By hypothesis, a rule penalizing the defendant for turning down a plaintiff's settlement demand will give the plaintiff – who went on

to win the case and get a judgment – an extra dollop of relief, akin to punitive damages or attorneys' fees. The decision whether to give successful plaintiffs this additional relief involves considerations of the adequacy of remedies. Committees drafting or promulgating procedural rules might well decide to leave those considerations to other bodies to weigh.

The judgment is reversed and the case remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

S.A. HEALY COMPANY, Plaintiff,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, Defendant.

No. 91-C-1260.

United States District Court,
E.D. Wisconsin.

Dec. 6, 1994.

After offer of settlement of $1,125,000 by contractor who brought diversity action against metropolitan sewer district was rejected, jury trial was held, and award of $1,574,021 was returned for contractor. Contractor moved for costs and interest under state statute based on rejection of offer, and sewer district moved for stay of execution of judgment and waiver of any supersedeas bond. The District Court, Myron L. Gordon, J., held that: (1) Rule 68 of Federal Rules of Civil Procedure applies to diversity actions and prevented recovery of costs by contractor even though recovery would have been available under state law, and (2) motion for stay and waiver would be granted as sewer district had $83 million in investment fund from which judgment could be satisfied.

Granted in part and denied in part.

See also 154 F.R.D. 212.

Watt, Tieder & Hoffer by Mark A. Sgarlata, McLean, VA, Godfrey & Kahn by Jane C. Schlicht, Milwaukee, WI, for plaintiff.

Robert Crawford, Milwaukee, WI, for defendant.

DECISION and ORDER

MYRON L. GORDON, District Judge.

On November 21, 1991, the plaintiff, S.A. Healy Company ["Healy"], filed a complaint in this court asserting various state law claims against the Milwaukee Metropolitan Sewerage District ["MMSD"] arising out of a dispute concerning their construction contract. Federal jurisdiction over this action is grounded in 28 U.S.C. § 1332(a)(1), as the matter in controversy exceeds the sum of $50,000 and is one between citizens of different states.

A jury trial was conducted in the action from Monday, July 11, 1994, through Friday, July 22, 1994. On July 22, 1994, the jury returned a verdict for the plaintiff in the amount of $1,574,021, and a judgment was entered in favor of Healy for this amount, plus costs, on that same date. Presently before the court are the following two motions: (1) Healy's "Motion for Costs and Interest Pursuant to Wisconsin Statute § 807.01"; and (2) MMSD's "Motion to Stay Execution on the Judgment and Waiver of any Supersedeas Bond."

I. Motion for Costs and Interest Pursuant to Wis.Stat. § 807.01

In its motion for costs and interest pursuant to Wis.Stat. § 807.01, the plaintiff seeks interest and double the amount of its taxable costs under Wis.Stat. § 807.01. Wis.Stat. § 807.01(3) provides:

> the plaintiff may serve upon the defendant, a written offer of settlement for the sum, or property, or to the effect therein specified, with costs.

> . . . If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

Wis.Stat. § 807.01(2) is substantially similar to Wis.Stat. § 807.01(3) except that it permits the ***defendant*** to make an offer of settlement. In addition, Wis.Stat. § 807.01(4) states:

> If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid.

It is undisputed that Healy made an offer of settlement on November 29, 1993, in the amount of $1,125,000 pursuant to Wis.Stat. § 807.01(3). That offer was not accepted by MMSD. On July 22, 1994, judgment was entered in favor of Healy in the amount of $1,574,021. As a result, Healy maintains that it is entitled to double its taxable costs and to interest at the rate of 12% from November 29, 1993, until paid.

Rule 68, Federal Rules of Civil Procedure, which governs offers of judgment in federal court, is seemingly contrary to Wis.Stat. § 807.01 as it provides, in part (with emphasis added):

> At any time more than 10 days before the trial begins, a ***party defending against a claim*** may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer,

> with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. . . .

Thus, under Rule 68, a plaintiff may make an offer of judgment only as to any counterclaim asserted against it. As the offer of judgment made by Healy did not relate to any such counterclaim, Healy was not permitted to make the offer under Rule 68, Federal Rules of Civil Procedure.

The merits of Healy's claim that the state statute governs the disputed issue depend upon a finding that Wis.Stat. § 807.01, as opposed to Rule 68, is applicable in diversity actions in federal court. In diversity cases, the substantive law to be applied is that of the state of Wisconsin. MMSD argues that the relevant provisions of Wis.Stat. § 807.01 are ***procedural*** and therefore must yield to the controlling and conflicting federal rule of procedure – Rule 68, Federal Rules of Civil Procedure. Healy does not dispute MMSD's characterization of Wis.Stat. § 807.01 as a procedural rule; however, it disagrees with MMSD's conclusion that the state statute is overridden by Rule 68, Federal Rules of Civil Procedure.

In determining whether a state procedural rule should be employed in a federal diversity case, the court must first consider whether there is a Federal Rule of Civil Procedure sufficiently broad in scope to control the

disputed procedural issue. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50, 100 S.Ct. 1978, 1985, 64 L.Ed.2d 659 (1980). If there is such a rule, that rule controls provided that it is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and a constitutional grant of power. *Walker*, 446 U.S. at 747-48, 100 S.Ct. at 1983. If there is no federal rule which covers the point in dispute, the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), commands the enforcement of state law. *Hanna v. Plumer*, 380 U.S. 460, 470, 85 S.Ct. 1136, 1143, 14 L.Ed.2d 8 (1965).

To date, three branches of the eastern district of Wisconsin have addressed the issue of the applicability of Wis.Stat. § 807.01 in federal diversity cases. Two have concluded that the state statute is not applicable. *Hutchison v. Burning Hills Steel Co., Inc.*, 559 F.Supp. 553 (E.D.Wis.1983) (Reynolds, J.); *Klawes v. Firestone Tire & Rubber Co.*, 572 F.Supp. 116, 119 (E.D.Wis.1983) (Warren, J.). On the other hand, in *Dillingham-Healy v. Milwaukee Metropolitan Sewerage District*, 796 F.Supp. 1191, 1193 (E.D.Wis.1992) (Evans, C.J.), the district court concluded that the scope of Rule 68, Federal Rules of Civil Procedure, was more narrow than Wis.Stat. § 807.01 and, therefore, was not sufficiently broad in scope to cover the procedural issue. *Dillingham*, 796 F.Supp. at 1193. The court went on to determine that the purposes of the *Erie* doctrine would be better served if Wis.Stat. § 807.01 were used in federal diversity cases. *Dillingham*, 796 F.Supp. at 1193; *Datapoint Corp. v. M & I Bank of Hilldale*, 665 F.Supp. 722, 728-29 (W.D.Wis.1987) (Crabb, J.).

I find that Rule 68, insofar as it addresses the procedure for making an offer of judgment in federal court,

is sufficiently broad to cover the resolution of the issue presently before this court. Rule 68 precludes a non-defending party – such as Healy – from making an offer of judgment and then holding the defending party – MMSD – liable for costs if the judgment, if any, obtained by the non-defending party exceeds the sum offered. That Rule 68 is less liberal than the state procedural rule in terms of its grant of the privilege of an offer of settlement does not mean that the scope of the federal rule is too narrow to control the procedural issue in dispute.

Rule 68 is also within the ambit of the Rules Enabling Act which states, in part:

> "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions. . . . Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury. . . . "

Where, as here, a disputed issue is covered by the federal rule, the court must also determine whether application of the rule will abridge, enlarge or modify any ***substantive*** right. *See Platis v. Stockwell*, 630 F.2d 1202, 1205 (7th Cir.1980). Neither party disputes that Rule 68 is a rule of procedure. Admittedly, the application of Rule 68 will effect the plaintiff's rights as it does not extend the privilege of an offer of settlement to non-defending parties such as the plaintiff. However, this effect does not amount to an enlargement, abridgment or modification of the substantive rule of law at issue in this case – state contract law. Rather, Rule 68 is a procedural directive

which is aimed at "augmenting the fairness and efficiency of the litigation process in federal court," *Platis*, 630 F.2d at 1206 (citing Ely, *The Irrepressible Myth of Erie*, 87 Harv.L.Rev. 693, 725 (1974)), as it "encourag[es] settlements and avoid[s] protracted litigation." 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3001 (1973).

The requirement that Rule 68 be within the constitutional power of the legislative and judicial branches of government is also satisfied. The United States Supreme Court has recognized that:

> the constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna, 380 U.S. at 471-72, 85 S.Ct. at 1144. *See also Platis*, 630 F.2d at 1206.

I conclude that the requirements of Rule 68, Federal Rules of Civil Procedure, must be adhered to in diversity actions in federal court. Accordingly, Healy's motion for costs and interest under Wis.Stat. § 807.01 will be denied.

As an additional matter, I reject Healy's argument that MMSD has waived the right to object to Healy's request for costs under Wis.Stat. § 807.01 because it did not move to strike the offer of settlement when it was made. Healy improperly raised this argument for the first time in its reply brief which did not permit MMSD to

respond. In addition, Healy cites no authority for the proposition it advances.

II. Motion to Stay Execution on the Judgment and Waiver of any Supersedeas Bond

MMSD seeks an order under Local Rule 9.05 and Rule 62(d), Federal Rules of Civil Procedure, for a stay upon the execution of judgment and a waiver of any supersedeas bond. Under Rule 62(d), Federal Rules of Civil Procedure, when an appeal is taken, an appellant is permitted to obtain a stay of the execution of the judgment by giving a supersedeas bond. According to Rule 9.05,

> [a] supersedeas bond, where the judgment is for a sum of money only, shall be in the amount of the judgment plus fifteen (15) percent to cover interest and such damages for delay as may be awarded plus $500.00 to cover costs.

The decision to stay execution of a judgment pending appeal without requiring a bond is within a court's discretion. *Lightfoot v. Walker*, 797 F.2d 505, 506 (7th Cir.1986). When making this decision, a court should consider the following criteria: (1) "the complexity of the collection process"; (2) "the amount of time required to obtain a judgment after it is affirmed on appeal"; (3) "the degree of confidence that the district court has in the availability of funds to pay the judgment"; (4) whether the defendant's ability to pay the judgment is so obvious that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial state that "the requirement to post a bond would place

other creditors of the defendant in an insecure position." *Dillon v. City of Chicago*, 866 F.2d 902, 904-905 (7th Cir.1988).

MMSD offered the affidavit of Mark Kaminski, the assistant controller for MMSD, which the plaintiff did not dispute, which outlined the method of payment of the judgment in this action. According to Mr. Kaminski's affidavit, MMSD is able to pay the judgment within seven days after issuance of the mandate by the court of appeals for the seventh circuit out of a fund maintained with the State of Wisconsin Local Government Pooled Investment Fund ["investment fund"]. As of September 1, 1994, MMSD had a balance of $83,400,000 in the fund. Mr. Kaminski states that upon notice to the fund by 10:00 a.m. on any business day, $1,574,021 (plus applicable interest) will be available the following business day to pay Healy's judgment. In addition, Mr. Kaminski asserts that payment of the judgment will be done without any deliberation or legislative vote by the commission of the MMSD.

Clearly, the investment fund of $83,400,000 has sufficient assets to cover Healy's $1,574,021 judgment against MMSD. MMSD has adequately demonstrated that these funds are available to pay judgments without substantial delay or other difficulty. Healy makes a general attack on the sufficiency of these funds but has not presented any evidence which contradicts Mr. Kaminski's sworn representations that the money in the investment fund can be utilized by MMSD to pay its judgment. *Cf. Lightfoot*, 797 F.2d 505 (court of appeals denied request for waiver of supersedeas bond by the state of Illinois because the state

had not established a particular fund from which judgments are satisfied).

I am satisfied that funds are available to MMSD to pay the judgment in a prompt and workable manner if the judgment is affirmed on appeal. Accordingly, MMSD's motion to stay execution on the judgment and waiver of the supersedeas bond will be granted.

Therefore, IT IS ORDERED that Healy's "Motion for Costs and Interest Pursuant to Wisconsin Statute § 807.01" be and hereby is denied.

IT IS ALSO ORDERED that MMSD's "Motion to Stay Execution on the Judgment and Waiver of any Supersedeas Bond" be and hereby is granted.

IT IS FURTHER ORDERED that the execution of Healy's judgment be and hereby is stayed without bond pending appeal.

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

(2)

No. 95-546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
a special purpose Wisconsin municipal corporation,

Petitioner,

v.

S.A. HEALY COMPANY,
an Ohio corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Rule 68, FED. R. CIV. P., precludes the application of a Wisconsin statute penalizing a defendant who unreasonably refuses a settlement demand by a plaintiff in a diversity action.

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No. 95-546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
a special purpose Wisconsin municipal corporation,

Petitioner,

v.

S.A. HEALY COMPANY,
an Ohio corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, S.A. Healy Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Milwaukee Metropolitan Sewerage District.

Respondent is satisfied with the presentation by Petitioner of all statements except those included in

Petitioner's "Question Presented" and "Reasons for Granting the Writ" sections. Respectfully, and in accordance with Supreme Court Rule 24.2, Respondent has stated its question presented and proceeds directly to its "Reasons for Denying the Petition."

REASONS FOR DENYING THE PETITION

I.

THE DECISION BELOW FOLLOWS GOVERNING SUPREME COURT PRECEDENT ON THE APPLICABILITY OF A STATE STATUTE IN A FEDERAL DIVERSITY ACTION.

The issue presented for review by Petitioner is whether Rule 68, FED. R. CIV. P. ("Rule 68"), which by its terms addresses only *plaintiffs'* refusal of defendants' settlement offers, is sufficiently broad to preclude the application of state law regarding *defendants'* refusal of plaintiffs' settlement demands in federal diversity actions, and thus preempts the Wisconsin statute applied by the Court of Appeals below. This issue was properly resolved below based upon the rules enunciated in *Hanna v. Plumer*, 380 U.S. 460 (1965), and subsequently in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 (1987) and *Stewart Organizations, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), in which this Court confirmed and clarified the analysis to be employed in diversity actions where a state law is alleged to conflict with a federal rule of procedure. Under this Court's rulings, the determination of whether there is a conflict between a federal rule and a state law is based upon whether there exists a federal rule "sufficiently broad" to cause a "direct collision" with the state law or to control the issue before the court. *Walker*, 446 U.S. at 749-50; *Hanna*,

380 U.S. at 471-72. Thus, there is a well-defined precondition to the applicability of a federal rule in the face of an allegedly contrary state law: the federal rule, when properly construed, truly must circumscribe the disputed issue in order to preempt the state law.[1] Certiorari should be denied because the decision issued by the Seventh Circuit Court of Appeals (Chief Judge Richard Posner) properly applied the test articulated in *Hanna* and its progeny and correctly concluded that there was no conflict between Rule 68 and Wis. Stat. §807.01(3) and (4).

Petitioner requests that this Court grant certiorari based upon the argument that the Court of Appeals' decision erroneously focused upon the terms of Rule 68 rather than whether the federal rule and state law were sufficiently coextensive in purpose. Petitioner misreads both the decision below and Rule 68. Nowhere in the decision below is there application of a test contrary to that set forth by this Court, most recently in *Stewart.* Consistent with the controlling decisions of this Court, the Court of Appeals performed an exacting analysis of whether Rule 68 is sufficiently broad to govern the issue of pretrial settlement demands by plaintiffs and concluded correctly that there is no basis in the Rule or its history for the position asserted by Petitioner. Citing and following the very case Petitioner contends is ignored, *Burlington*, the Court of Appeals examined the potential conflict between Rule 68 and Wis. Stat. §807.01(3) and (4), and properly concluded that Rule 68 had nothing to say about the case before it, which involves a plaintiff's

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[1] Petitioner conceded during oral argument below that, in the absence of a "direct collision" between Federal Rule 68 and Wis. Stat. §807.01(3) and (4), the Wisconsin Statute must be applied in this diversity case.

demand of settlement rather than a defendant's settlement offer.

Petitioner further seeks review of the decision of the Court of Appeals on the ground that Wis. Stat. §807.01 (3) and (4) and Rule 68 are sufficiently coextensive so as to indicate that Rule 68 occupies the entire field of operation of Wis. Stat. §807.01. As the Court of Appeals found, this position is baseless. First, Rule 68 is narrower in scope than the Wis. Stat. §807.01 because Rule 68 only applies to offers of settlement made by defendants. There is no language of any kind in Rule 68 that even addresses a plaintiff's settlement demand. Thus, the Court of Appeals noted the lack of a direct conflict and held that the subsections of Wisconsin's offer of settlement statute involved in this case govern *demands by plaintiffs,* while Rule 68 is limited to *offers by defendants,* stating, "[t]here is no inconsistency [with Rule 68] when a plaintiff's demand rather than a defendant's offer is in issue." Petitioner's Brief App. 10a.

Second, there is no direct or unavoidable collision between Rule 68 and Wis. Stat. §807.01(3) and (4), which would serve to void or displace Rule 68 in diversity actions. In determining whether there was a direct collision between the federal rule and the state law, the Court of Appeals considered what effect the application of Wis. Stat. §807.01 would have on Rule 68. As the Court of Appeals stated, it was "[u]nable at the argument of the appeal to extract from the sewage district's lawyer *any case real or hypothetical* in which enforcing the Wisconsin rule on plaintiffs' demands would tread on the toes of Rule 68." Petitioner's Brief App. 12a (emphasis added). The Court further reasoned correctly that whether or not a plaintiff makes a settlement demand under Wis. Stat. §807.01, a defendant is free to make

his own offer under Rule 68. Petitioner's Brief App. 13a. Thus, the imposition of Wis. Stat. §807.01 did not displace Rule 68 either in purpose or effect.

To apply Rule 68 as requested by Petitioner would drastically broaden Rule 68 to entirely preempt the area of pretrial settlement, thus infringing upon the states' right to promote their own public policy goals with respect to settlement of state law disputes. Petitioner would have this Court construe Rule 68 to prohibit the state of Wisconsin from penalizing a defendant for failing to accept a settlement demand. As Rule 68 is not sufficiently broad to subsume Wis. Stat. §807.01 (3) and (4) or clearly collide with the application of Wisconsin law to the case below, Petitioner's interpretation would wrongfully encroach upon a law properly within the state's province, and would promote forum shopping by giving Wisconsin defendants "an added incentive to remove a diversity case to Federal District Court." Petitioner's Brief App. 11a.

II.

THERE IS NO ISSUE OF GENERAL IMPORTANCE WHICH WARRANTS CERTIORARI.

This case does not present a question which merits review by this Court. The standard for determining whether a federal rule or a state law is applicable in a diversity case has been enunciated by this Court many times, in *Hanna v. Plumer,* 380 U.S. 460, *Walker v. Armco Steel Corp.*, 446 U.S. 740, and more recently in *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22. The holding below is entirely consistent with this Court's rulings, as well as those of the other circuits that have analyzed comparable disputes involving laws similar to Wis. Stat. §807.01(3) and (4).

Petitioner can point to no conflict between the decision below and any decision of this Court or another circuit court of appeals. As the Court of Appeals noted below, the circuits are consistent in their application of the appropriate test and in their holdings that the Federal Rules do not preclude the application of state laws which are similar to Wis. Stat. §807.01(3) and (4). Petitioner's Brief App. 10a-11a *citing, Tanker Management, Inc. v. Brunson,* 918 F.2d 1524 (11th Cir. 1990) (holding that Rule 68 did not preempt state law on offers of settlement since Rule 68 applies only to offers of judgment and is not applicable to settlement offers); *Fauber v. KEM Transportation & Equipment Co., Inc.,* 876 F.2d 327 (3rd. Cir. 1989) (holding that a Pennsylvania rule assessing additional damages where a plaintiff recovers more than 125% of an offer requested by the defendant does not conflict with FED. R. CIV. P. 11 or FED. R. CIV. P. 37); *Jarvis v. Johnson,* 668 F.2d 740 (3rd. Cir. 1982) (holding that a Pennsylvania settlement rule is substantive and outcome determinative, and, therefore, applicable in diversity actions).

In addition, a number of other circuits have held that similar state laws regarding offers of settlement should be applied in diversity actions. *See Armacost v. Amica Mutual Ins. Co.,* 821 F.Supp. 75 (D.R.I.), *aff'd,* 11 F.3d 267 (1st Cir. 1993) (applying Rhode Island settlement demand statute, which provides for interest to encourage settlements, in diversity action); *Camp, Dresser & McKee, Inc. v. Technical Design Assoc., Inc.,* 937 F.2d (2nd Cir. 1991) (holding that a Connecticut statute allowing a plaintiff to recover 12% interest if it recovered an amount equal to or greater than that stated in an unaccepted settlement demand applied in federal diversity cases).

Petitioner notes that sixteen states have enacted rules similar to Wis. Stat. §807.01(3) and (4) in that they attempt to encourage settlement of disputes in cases involving state law by penalizing defendants for refusing plaintiff's demands of settlement when the result in the case ultimately proves the demand to have been reasonable. Contrary to Petitioner's assertion, however, this fact does not present an issue worthy of certiorari. In the absence of any conflict between state law and a federal rule, states are free to pursue their own policy goals and to enact laws to encourage those policies. As Judge Posner noted in the Court's opinion below, the Wisconsin rule is a valid exercise of a state's right to enact laws to advance its own policies:

> States are allowed to favor plaintiffs—or defendants—who engage in activities, such as, here, making contracts for constructing sewage systems, that are governed by state law. Under *Erie*, this 'favoritism' is to operate even when the persons who have a dispute over state law find themselves in a federal court. The power of the state to jigger procedural rules to favor plaintiffs or defendants in federal diversity suits is limited by the Rules Enabling Act and the Supremacy Clause, but the Wisconsin Rule does not transgress those limits.

Petitioner's Brief App. 14a.

Finally, Petitioner requests that this Court grant certiorari because the Seventh Circuit disturbed the balance between plaintiffs and defendants purportedly intended by Rule 68, by subjecting defendants in diversity cases to Wisconsin's allegedly pro-plaintiff settlement rule. This argument was not raised below and is not properly raised

here.[2] Nevertheless, the Court of Appeals considered the argument and rejected it as unpersuasive:

> [W]e can imagine an argument that by subjecting defendants in diversity cases to Wisconsin's highly pro-plaintiff settlement rule, we would be disturbing a delicate but deliberate balance between plaintiffs and defendants that is struck in the federal rules, and hence undermining the integrity of those rules. *The argument is not made, and is anyway unpersuasive.*

Petitioner's Brief App. 14a (emphasis added). This ruling is correct. States are allowed to enact laws furthering state policies as long as they do not violate either the Rules Enabling Act or the Supremacy Clause. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As Wis. Stat. §807.01(3) and (4) violates neither, it would be improper for a federal court, sitting in diversity, to countermand Wisconsin's right to effectuate its own policy goals of encouraging settlement.

In further support of the contention that the balance between plaintiffs and defendants has been disturbed by the ruling below, Petitioner argues that Rule 68, as drafted, protects a defendant from any state law settlement pressure.[3] It is because of this protectionist policy, Petitioner contends, that the 1983 and 1984 proposed amendments to Rule 68, allowing plaintiffs to make

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[2]This Court has stated on numerous occasions that it will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. *See, e.g., Youakim v. Miller*, 425 U.S. 231 (1976). Petitioner has not presented any reason to depart from this Court's normal practice.

[3]This argument was also not raised below, but was nevertheless considered and rejected by the Court of Appeals. Petitioner's Brief App. 15a.

settlement offers, were rejected. Petitioner's speculation about the basis for the rejection of proposed amendments to Rule 68 does not advance its argument. Petitioner's contention is plainly unsupported by the Rule and the corresponding advisory committee comments. Nowhere in Rule 68 or the advisory committee comments to the Rule is there any suggestion of such a rationale for the adoption of the Rule or the rejection of the proposed amendments. In fact, Petitioner's own citation reveals that the reason for the rejection of the proposed amendments was the criticism brought to bear by the civil rights bar, believing that adopting such proposals on a uniform federal basis might chill the enforcement of civil rights. 7 MOORE'S FEDERAL PRACTICE ¶ 68.-07 [5] (2d. Ed. 1995).

Another possible rationale for the rejection of the proposed amendments was that the difficult decision of whether to allow plaintiffs the opportunity to make settlement offers was thought better left to the states. As stated in the opinion below, "[t]he decision of whether to give successful plaintiffs this additional relief involves considerations of the adequacy of remedies. Committees drafting or promulgating procedural rules *might well decide to leave those considerations to other bodies to weigh.*" Petitioner's Brief App. 15a (emphasis added).

III.

PETITIONER'S NEW ARGUMENT THAT WIS. STAT. §807.01(4) CONFLICTS WITH FEDERAL POSTJUDGMENT INTEREST LAW IS WRONG AND DOES NOT WARRANT CERTIORARI.

Petitioner, for the first time, now contends that by requiring 12% interest on the amount recovered, Wis. Stat. §807.01(4) clashes with the federal statute on postjudgment interest, 28 U.S.C. §1961. This contention was not properly preserved below, and in any event, does not warrant certiorari. As recognized by the Court of Appeals below, there is no clash between Wis. Stat. §807.01(4) and the federal statute on postjudgment interest because Wis. Stat. §807.01 uses postjudgment interest only as part of the measuring rod for determining the penalty appropriate for a defendant's unreasonable refusal of a settlement demand:

> [T]he Wisconsin rule on the consequences of turning down a plaintiff's settlement demand is not a rule about the taxing of costs, or the awarding of prejudgment interest, in the usual senses of "costs" and of "prejudgment interest." The rule imposes a sanction on defendants for turning down reasonable settlement demands. "Costs" and "prejudgment interest" . . . are merely the measuring rods for determining the amount of the sanction. Wisconsin could have said to defendants that if they reject a modest settlement demand—modest because the plaintiff won a larger judgment at trial—they must pay the plaintiff $200,000 above his judgment. Then it would be plain that this additional relief was entirely separate from the judgment—that it was like an award of attorney's fees to a defendant as a sanction for filing a frivolous suit. The logic of the measuring rods actually used is transparent.

Petitioner's Brief App. 3a-4a. The use of costs and interest as the amount of money to be paid to a successful plaintiff under Wis. Stat. §807.01(3) and (4) is simply a means to apply a "penalty" to a defendant for an unreasonable failure to settle. The amounts due a plaintiff under Wis. Stat. §807.01(3) and (4) are not "judgments" subject to the federal postjudgment interest statute, and there is no "direct collision" between the Wisconsin statute and 28 U.S.C. §1961.

IV.

PETITIONER'S NEW ARGUMENT THAT WIS. STAT. §807.01 CONFLICTS WITH FED. R. CIV. P. 38 IS WRONG AND DOES NOT WARRANT CERTIORARI.

Petitioner's final new argument, not raised below, is that certiorari should be granted because "[t]he Wisconsin rule imposes a mandatory penalty during the appeal" and that "[m]andatory penalties are inconsistent with the discretionary scheme of FED. R. APP. P. 38." This argument was not raised below and makes no sense. Appellate Rule 38 deals with damages and costs for frivolous appeals and states in its entirety: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Wis. Stat. §807.01 does not apply at all to the issue of penalties, mandatory or discretionary, during appeals. Petitioner has misread Appellate Rule 38, and this argument has no relevance to Wis. Stat. §807.01.

CONCLUSION

Certiorari is not warranted. The Court of Appeals correctly applied the governing precedent of this Court and correctly held that there is no conflict between Rule 68, FED. R. CIV. P., and Wis. Stat. §807.01(3) and (4). For the foregoing reasons and in accordance with the above cited authority, Respondent respectfully submits that certiorari should be denied to Petitioner and the decision of the United States Court of Appeals for the Seventh Circuit allowed to stand.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION

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I. Forum Shopping

The Seventh Circuit worried that forum shopping would result if FED. R. CIV. P. 68 preempted the Wisconsin rule, and the respondent sounded the same theme. App. 11a; Respondent's Brief 5. This misstates the law. A resident defendant is barred from invoking diversity jurisdiction and removing to federal district court. 28 U.S.C. § 1441(b) (1988). As a Wisconsin corporation, the petitioner cannot remove to federal court in Wisconsin.

Moreover, it was unnecessary for the Seventh Circuit to balance *Erie's* twin aims, (1) discouragement of forum-shipping and (2) avoidance of inequitable administration of the laws. When determining whether a federal procedural rule preempts an analogous state procedural rule, "[t]he first question must . . . be whether the scope of the federal rule in fact is sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). Chief Judge Posner recast this first question, asking whether the Wisconsin rule is "so entwined with procedures prescribed by the federal rules that it is likely to impair the integrity of federal procedure if it is applied in diversity cases?" App. 10a. As recast by Chief Judge Posner, the first question expresses a *preference* for the state rule in diversity cases, a preference that displaces the federal rule so long as the integrity of federal procedure is unimpaired, a preference at odds with the Court's insistence that the federal rule preempt the state rule under the Rules Enabling Act whenever the federal rule is sufficiently broad to cover the point in dispute. The Seventh Circuit's answer to this first question conflicts with *Burlington Northern Railroad Company v. Woods*, 480 U.S. 1 (1987), conflicts with *Stewart*

Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), and compels review on certiorari.

II. Absence of Circuit Conflict

The respondent argues that review on certiorari is unwarranted because no conflict exists between the Seventh Circuit's decision and decisions from other circuits. Respondent's Brief 6. Respondent's argument is a straw-man. The petitioner seeks review on certiorari because the Seventh Circuit's decision conflicts with the Court's decisions in *Burlington Northern Railroad Company v. Woods* and *Stewart Organization, Inc. v. Ricoh Corp.* under S. Ct. R. 10(c) and not because of a circuit conflict.

While the Seventh Circuit cited three federal decisions as supportive, the Seventh Circuit's rationale stands alone. App. 10a-11a. For instance, neither *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1528-29 (11th Cir. 1990) nor *Fauber v. KEM Transportation & Equipment Co.*, 876 F.2d 327, 331-32 (3d Cir. 1989), considered *Burlington Northern Railroad Co. v. Woods, Stewart Organization, Inc. Ricoh Corp.*, and the Court's holdings that a federal rule is sufficiently broad to preempt the state rule under the Rules Enabling Act when the federal rule and state rule are sufficiently coextensive. Similarly, the third case cited by the Seventh Circuit, *Jarvis v. Johnson*, 668 F.2d 740, 745-46 (3d Cir. 1982), never considered Rule 68 and never considered whether Rule 68 was coextensive with the state rule that allows prejudgment interest in tort cases. Consequently, these three lower court decisions afford no support for the Seventh Circuit's rationale and no basis

for asserting a conflict among the circuits as a reason for review on certiorari.

III. Issue Preserved for Review on Certiorari

Finally, the respondent urges that some arguments offered in the certiorari petition were waived. Respondent's Brief 7-11. To the contrary, the arguments that the respondent points to highlight the court of appeals' error, do not raise a new claim, and underscore the need for review on certiorari. " 'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Respectfully submitted,

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